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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

THE BLAKEMORE-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Petitioner, Norfolk & Western Railway Company, defendant, appellee in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 12, 1951, reversing the judgment of the United States District Court for the Northern District of Illinois and remanding the case to that court with directions to grant respondent (plaintiff, appellant below) a new trial (R. 286).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported in 188 Fed. 2d at 691.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit became final upon the denial of the petition of petitioner for a rehearing on May 17, 1951 (R. 288). This petition is filed within ninety days from said date as provided by 28 U. S. C., Section 2101(c). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether an order denying a new trial may be reviewed by this Court or a court of appeals.

2. Whether an order denying a motion for a new trial may be reviewed by this Court or a court of appeals where no motion for a directed verdict was made in the District Court by the losing party and where the court of appeals holds that such party cannot accordingly question the sufficiency of the evidence supporting the judgment appealed from.

3. Whether this Court or a court of appeals on an appeal from a judgment in favor of the defendant entered on a verdict of not guilty where no motion for a directed verdict was made by the plaintiff, may exercise the discretion possessed by a trial judge, reverse an order denying a new trial and remand the case with directions to grant a new trial.

4. Whether this Court or a court of appeals may review an order denying a new trial where there has been no abuse of discretion by the trial court in overruling such motion and where no error of law appears in the trial court's rulings.

5. Whether this Court or a court of appeals, in view of the Seventh Amendment to the Federal Constitution, can

re-examine the verdict of a jury otherwise than according to the rules of the common law and reverse the judgment solely for alleged error of fact in the verdict and for alleged error of the District Court in overruling plaintiff's motion for a new trial.

STATEMENT.

On February 4, 1944, plaintiff purchased a ticket at the Central Station, Chicago, for passage to Petersburg, Virginia, to visit her husband, who was stationed at Camp Lee, Virginia. She traveled from Chicago to Cincinnati, Ohio, over another line. At Cincinnati she could not procure sleeping car accommodations and gave a redcap a tip to take her and her baggage through a side door so that she could get on the train of the defendant before the crowd waiting to board the train (R. 31-33). The train in question ran from Cincinnati, Ohio, to Norfolk, Virginia; there were three crews on that run and the occurrence out of which this action arises took place while the crew which went from Williamson, West Virginia, to Roanoke, Virginia, was in charge of the train (R. 120-21). Plaintiff, a colored person, rode in a coach where she was the only colored passenger (R. 127, 202). Shortly before the train reached the Virginia line, the front brakeman twice requested the plaintiff to move forward to a coach with like conveniences reserved for colored persons in compliance with the Virginia statute requiring segregation of white and colored passengers and the regulations of the defendant promulgated pursuant thereto (R. 192, 194). The brakeman again asked plaintiff to move after the train was in Virginia (R. 201, 202). The conductor on defendant's train also asked plaintiff to move (R. 125). She refused and kept her seat. At Christiansburg, 25 miles west of Roanoke, the conductor wired ahead to the super-

intendent, station master and special officer at Roanoke (R. 129).

A special officer appointed by a Virginia court boarded the train at Roanoke and was shown to the car where plaintiff was riding (R. 210, 211, 213). He exhibited his badge to plaintiff and asked her to move to the car reserved for colored persons, explaining the provisions of the Virginia statute and the regulations. She still refused (R. 213, 214). He went to pick up her coat to hand it to the porter, whereupon she slapped him in the face and said, "Leave that damn coat alone." He then secured the assistance of a military policeman who was in the car and plaintiff was removed from the train (R. 214). She was then taken in the Roanoke police patrol wagon over to police headquarters where she was booked on charges of violating Section 3983 of the Virginia Code and disorderly conduct (R. 159). This took place on a Saturday after the adjournment of court and she was released on bond sometime that evening (R. 181, 182, 41). She then proceeded to Petersburg, Virginia, and returned to Roanoke with her husband on the following Monday, where a trial was had in the afternoon (R. 42, 43, 44). Plaintiff was found guilty of disorderly conduct and fined $5.00 and costs amounting to $6.50, all of which she paid (R. 105).

Plaintiff instituted this action for damages in the Circuit Court of Cook County, Illinois, and on the petition of the defendant the case was removed to the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago (R. 7). A jury trial was had and a verdict of not guilty was returned (R. 258). Plaintiff's motion for a new trial was overruled (R. 262). She appealed to the United States Court of Appeals for the Seventh Circuit and that court reversed the judgment of the District Court and remanded the case to that Court with directions to grant her a new trial (R. 286).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In reviewing the order of the District Court denying plaintiff's motion for a new trial.

(2) In holding that it could review the order of the District Court denying plaintiff a new trial, when plaintiff had made no motion for a directed verdict and therefore was not in a position to deny that the judgment appealed from was supported by substantial evidence.

(3) In holding that it could review the order of the District Court denying the motion of the plaintiff for a new trial when there had been no abuse of discretion by the District Court in overruling such motion and no error of law made by the District Court in its rulings at the trial.

(4) In holding that it could review the order of the District Court denying the motion of the plaintiff for a new trial for alleged error of fact.

(5) In holding that it could review the order of the District Court denying plaintiff's motion for a new trial when there had been no failure by the District Court to consider said motion nor any matter appropriate to a decision on said motion.

(6) In reversing the judgment of the District Court and remanding the case to that Court with directions to grant plaintiff a new trial.

REASONS FOR GRANTING THE WRIT.

For decades, even for more than a century, this Court has held that no appeal lies from an order overruling a motion for new trial. The several courts of appeal have likewise held that an order overruling a motion for a new

trial is not appealable. In a few instances courts of appeal have recognized exceptions on grounds hereinafter discussed. In the instant case we submit that the decision of the United States Court of Appeals for the Seventh Circuit awarding plaintiff a new trial does not fall within any of the exceptions heretofore recognized, is in conflict with prior decisions of this Court and those of courts of appeal in the several circuits, and charts a hitherto untrodden course in the field of appellate procedure. In none of the decided cases does it appear that this Court or a court of appeals reviewed an order overruling a motion for a new trial where the losing party had failed to make a motion for a directed verdict and therefore was not in a position to assert that the judgment appealed from was not supported by substantial evidence. The question presented should be settled by this Court.

(1) An order overruling a motion for a new trial is neither appealable nor reviewable. The only exceptions recognized are that the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion; that the trial court acted on the mistaken view that there was no jurisdiction to grant a new trial or that there was no authority to grant it on the ground advanced, and lastly that in denying the motion for a new trial, the trial judge was guilty of an abuse of discretion analogous to an error of law.

(2) The decision of the Court of Appeals in the instant case does not come within any of the exceptions on which the decided cases rest, because there was no abuse of discretion by the trial court, there was no error of law in his rulings on the instructions or any other matter and the trial court did not exclude from consideration any matters appropriate to a decision on the motion.

(3) In granting a new trial the Court of Appeals did

by indirection what it could not do directly because it could not consider whether the evidence was sufficient to support the judgment in favor of the defendant because plaintiff had made no motion for a directed verdict. The Court of Appeals has in effect obliterated the rule that a party on appeal may not challenge the sufficiency of the evidence to support the verdict against him where he made no motion for a directed verdict.

(4) The cases cited by the Court of Appeals in its opinion do not support the conclusion which it reached.

ARGUMENT.

SUMMARY OF ARGUMENT.

For more than a century this Court has held that an order overruling a motion for new trial is not appealable. In reaching this conclusion the basic reason advanced is that whether a verdict of a jury is erroneous is a question of fact, and therefore not reviewable by this Court on constitutional grounds. In other cases the reason presented is that the allowance or denial of a motion for new trial calls for the exercise of discretion by the trial judge and is accordingly not reviewable. The principal exceptions to this rule are found largely in cases decided by the several courts of appeal wherein a trial judge excluded from consideration matters appropriate to a decision on the motion or refused to consider such a motion under the mistaken view that he had no jurisdiction.

In the instant case the defendant contends that the record shows that the trial judge gave conscientious and careful consideration to plaintiff's motion for a new trial and certainly was not guilty of any abuse of discretion; that even if the Court of Appeals took a different view of the evidence than the jury, this did not justify the Court of Appeals in substituting its judgment for that of the jury because, being an appellate tribunal, it could not retry the facts. A difference in judicial opinion is not synonomous with an abuse of judicial discretion.

The defendant also contends that instruction 33 discussed in the opinion of the Court of Appeals was proper and responsive to the amended complaint. Instructions given to the jury and not excepted to become the law of

the case on appeal. Plaintiff's attorney brought and tried this case on the assumption the acts alleged to have been committed by defendant were malicious. Plaintiff is not entitled to another chance to try this case on a different theory. A reviewing court should accept the construction of the complaint made by the parties at the trial. The District Court did not commit any error of law on its rulings on instructions or on any other matter at the trial.

In the case at bar the plaintiff made no motion for a directed verdict and therefore is not in a position to deny that the judgment is supported by substantial evidence. In granting plaintiff a new trial, the Court of Appeals has circumvented and undermined this rule to such an extent that it is virtually meaningless.

The cases cited by the Court of Appeals do not support its conclusion.

I.

AN ORDER OVERRULING A MOTION FOR NEW TRIAL IS NEITHER APPEALABLE NOR REVIEWABLE.

The cases may be classified as follows:

(a) No Review on Ground the Verdict Is Against the Weight of the Evidence:

United States v. *Socony-Vacuum Oil Company*, 310 U. S. 150 at 247-48; *Moore* v. *United States*, 150 U. S. 57 at 61; *Boston & Maine Railroad* v. *Dutille, Admr.* (CA, 1st Cir.), 289 Fed. 320 at 324; *O'Donnell* v. *New York Transportation Company* (CA, 2nd Cir.), 187 Fed. 109 at 110.

(b) No Review Because a Motion for New Trial Rests in the Sound Discretion of the Trial Court.

Holmgren v. *United States,* 217 U. S. 509 at 521; *Newcomb* v. *Wood,* 97 U. S. 581 at 583; *The Indianapolis and St. Louis Railroad Company* v. *Horst,* 93 U. S. 291 at 301; *Schuhardt, et al.* v. *Allen, et al.,* 1 Wall 359 at 371; *Doswell* v. *De La Lanzo, et al.,* 20 Howard 29 at 32; *Frasca* v. *Howell, et al.* (CA, Dist. Col. Cir.), 182 Fed. 2d 703; *St. Louis Southwestern Railway Company* v. *Ferguson* (CA, 8th Cir.), 182 Fed. 2d 949 at 954; *Larsen* v. *Chicago & Northwestern Railway Company* (CA, 7th Cir.), 171 Fed. 2d 841 at 845; *McBride, et al. v. Neal* (CA, 7th Cir.), 214 Fed. 966 at 968.

(c) No Review on the Ground of Error of Fact.

United States of America v. *Johnson,* 327 U. S. 106 at 111; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150 at 247; *Fairmount Glass Works* v. *Cub Fork Coal Company, et al.,* 287 U. S. 474 at 481; *Parsons* v. *Bedford,* 3 Peters 433 at 446; *The Maine Insurance Company of Alexandria* v. *Young,* 5 Cranch 187 at 190; *Cavness* v. *United States* (CA, 9th Cir.), 187 Fed. 2d 719 at 722.

(d) Generally:

Montgomery Ward & Company v. *Duncan,* 311 U. S. 243 at 253; *Kerr, et al.* v. *Clampitt, et al.,* 95 U. S. 188 at 189.

(e) The Only Exceptions to the Rule That an Order Overruling a Motion for New Trial Is Neither Appealable Nor Reviewable Are the Following:

(1) If the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion.

Mattox v. *United States,* 146 U. S. 140; *Ogden* v. *United States* (CA, 3rd Cir.), 112 Fed. 523 at 525.

(2) If the trial court acted on the mistaken view that there was no jurisdiction to grant a new trial or that there was no authority to grant it on the ground advanced.

> *Paine et al.* v. *St. Paul Union Stockyards Company* (CA, 8th Cir.), 35 Fed. 2d 624 at 626; *Dwyer* v. *United States* (CA, 9th Cir.), 170 Fed. 160 at 165; *Felton* v. *Spiro* (CA, 6th Cir.), 78 Fed. 576 at 581.

(3) An abuse of discretion analogous to an error of law and as such reviewable on appeal.

> *Virginian Railway Company* v. *Armentrout* (CA, 4th Cir.), 166 Fed. 2d 400 at 407; *Cobb* v. *Lepisto, et al.* (CA, 9th Cir.), 6 Fed. 2d 128 at 129.

II.

THE DECISION OF THE COURT OF APPEALS IN THE INSTANT CASE DOES NOT COME WITHIN ANY OF THE EXCEPTIONS ON WHICH THE DECIDED CASES REST.

(a) There Was No Abuse of Discretion by the Trial Court.

Judge John P. Barnes, the senior judge of the United States District Court for the Northern District of Illinois, who tried this case, was sympathetic to the plaintiff and gave her every opportunity to make out a case. In passing on her motion for a new trial, Judge Barnes said:

> "My state of mind is not such that I feel that I ought to set this verdict of the jury aside. Had I tried the case I would have found the defendant guilty and assessed a substantial sum. That is my state of mind. I am emotional sometimes, but not so emotional that I feel that I ought to set that verdict aside" (Rec. 256).

A very appropriate comment on what constitutes an abuse of judicial discretion is found in an early New York case.* An examination of the colloquy that took place between Judge Barnes and the attorney for the plaintiff on the hearing on plaintiff's motion for a new trial (R. 251-57) shows that Judge Barnes gave plaintiff's motion his conscientious and careful consideration. His conduct in overruling the motion was certainly neither arbitrary nor motivated by passion, prejudice or partiality. The Court of Appeals recognized this fact in its opinion (R. 284).

In considering plaintiff's appeal from the judgment of the District Court, it is undisputed that the Court of Appeals, sitting as a court of review, was without jurisdiction

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* In the case of *The People* v. *The New York Central Railroad Company*, 29 N. Y. 418, Justice Hogeboom, in a dissenting opinion, said at page 430:

"It has been said in some cases that this rule is subject to this qualification, that when the discretion shall appear to have been *abused*, the appellate forum may interfere. And there are cases holding that a gross and palpable abuse of discretion may be controlled and reversed. It has been doubted whether the power of review in such a case rests upon any very clear or firm foundation in the law, but I will assume it to exist. * * * The exercise of an honest judgment, however erroneous it may appear to be, is not an *abuse of discretion*. Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. In none of these particulars, in my opinion, is there just cause for imputation against the judge who pronounced this decision. Independent of his high character and position, I can find nothing in the facts of the case which justly exposes him to censure in these respects. He may have erred in judgment. It is not our province, I think, to determine whether he did so or not. It is quite possible many or any of us would not have reached the same precise conclusion. But this is not and cannot be the question. The question is, has his discretion been *abused*—has the result arrived at by him been produced by the exercise of an arbitrary and unlawful discretion? * * *"

to retry this action and to enter the judgment which it thought should have been entered in the trial court. *Emanuel* v. *Kansas City Title & Trust Company, et al.* (CA, 8th Cir.), 127 Fed. 2d 175 at 176; *Skinner* v. *Pennsylvania Greyhound Lines, Inc.* (CA, 7th Cir.), 123 Fed. 2d 497 at 498; *Swinger* v. *Firman Equipment Corporation* (CA, 7th Cir.), 94 Fed. 269 at 271. *Yet that is precisely what the Court of Appeals did.* Even though the Court of Appeals may have taken a different view of the evidence than the twelve jurors who saw the witnesses, observed their demeanor on the stand and heard them testify, nevertheless such circumstance would not of itself indicate that the trial court was guilty of an abuse of discretion in denying the motion of plaintiff for a new trial. As was aptly said by the Court of Errors and Appeals of New Jersey in *Day* v. *Donohue,* 41 Atl. 934 at 935:

> "* * * * 'difference in judicial opinion' is not synonomous with 'abuse of judicial discretion' * * *"

In *Fairmont Glass Works* v. *Cub Fork Coal Company, et al.,* 287 U. S. 474, this court, in an opinion by Mr. Justice Brandeis, said at page 481:

> "The rule that this court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; * * * The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this court was influenced by the mandate of the Judiciary Act of 1789, which provided in 22 that there should be 'no reversal in either (circuit or Supreme) court on such writ of error * * * for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for

> the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court."

It is submitted that the Court of Appeals in the case at bar was without power to review an alleged error of fact, namely, the verdict of the jury in favor of the defendant. In the case of *Aetna Casualty & Surety Company* v. *Yeatts* (CA, 4th Cir.), 122 Fed. 2d 350, cited in the opinion below, the Court of Appeals, after discussing the power of a federal trial judge to set aside a verdict on a motion for new trial and the non-reviewability generally of an order granting or refusing a new trial by a court of appeals, made this significant statement at page 355:

> "While an examination of the record has led us to the conclusion that the trial judge might very properly have granted the motion for new trial, we cannot say that his denial of the motion amounted to an abuse of discretion on his part. * * *"

There are no facts or circumstances present upon which an abuse of discretion by the trial judge in the case at bar can be based.

(b) There Was No Error of Law in the District Court's Rulings on Instructions or on Any Other Matter.

The amended complaint consists of one count. In one paragraph it is alleged that the conductor, a detective employed by the defendant, and a military policeman called by the conductor, "wilfully, wantonly and maliciously, and with great force and violence, seized hold of the plaintiff and charged her with unlawfully riding in a railroad car with white people, and violently and in a rude and insulting manner, pulled and dragged the plaintiff out of her seat, assaulted and beat her and injured her, and pulled her away from her baggage and belongings, and forcibly ejected her from said train. * * *" (R. 11.)

In another paragraph, it is alleged that the defendant "assaulted and beat the plaintiff and then and there willfully and maliciously seized and laid hold of the plaintiff, and with great force and violence pulled and dragged her about, * * * and wrongfully held and imprisoned the plaintiff there against her will, and upon the specific and direct instructions of said conductor in charge of defendant's train in which plaintiff was riding, plaintiff was locked up in a dirty, filthy jail for a long space of time * * *." (R. 11.) It was also charged that the conductor "ordered the false charge of riding in a railroad coach with white people against her (plaintiff). * * *" (R. 11.)

In another paragraph, it is averred that defendant "directed, caused and procured the plaintiff to be imprisoned, restrained and confined in said dirty and unsanitary jail, and deprived her of her liberty for a long space of time without any reasonable or probable cause whatsoever and without any writ, warrant or legal process of any kind whatsoever for so doing, and against the will of the plaintiff". (R. 11, 12.)

In a following paragraph of the amended complaint, it is alleged "that all of the aforesaid acts committed by said defendant were malicious and in disregard of plaintiff's rights, and done for the specific purpose of injuring plaintiff; that malice is the gist of this action." (R. 12.)

At the conclusion of plaintiff's evidence, the motion of the defendant that the charges made in each of the foregoing paragraphs be dismissed was denied. (R. 27, 28.) The only instruction discussed in the opinion of the Court of Appeals was one known as Number 33. We cannot agree with the Court of Appeals that it is clear that plaintiff's attorney objected to this instruction. If any objection was made by him, it is found on page 243 of the record. It is difficult to find any intelligible objection from that col-

loquy. This instruction was responsive to the amended complaint. This instruction did not impose on plaintiff conditions of recovery not warranted by her complaint and evidence. The Court of Appeals does not hold this instruction erroneous in view of the allegations of the amended complaint, but says that inasmuch as plaintiff could have charged what that Court calls "simple assault, false arrest and imprisonment", *the instruction required her to prove more than was necessary if her pleadings had been otherwise.* What took place is found in the record at pages 254 and 255 in a colloquy between the trial judge and the attorney for the plaintiff while the motion for new trial was being considered. The attorney for the plaintiff refused to separate the charges. The attorney for the defendant offered separate instructions pertaining to "false arrest, false imprisonment and malicious prosecution." The District Judge felt that the plaintiff would be prejudiced by the jury hearing so many instructions ending with the phrase "then you will find the defendant not guilty." He thereupon indicated that he would give a single instruction covering the several charges set forth in the amended complaint. Instruction 33 was the result.

We think that the remarks of Mr. Justice Jackson in commenting on an action brought under the Federal Safety Appliance Act are appropriate.* In this case the attor-

* *Sarah O'Donnell, Adm.* v. *Elgin, Joliet and Eastern Railway Company,* 338 U. S. 384, at 391.

> "We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking. We think the unfortunately prolonged course of this litigation is in no small part due to the failure to heed the admonition well stated by the Court of Appeals of the Seventh Circuit in a similar case: 'Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection.' * * * Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on

ney for the defendant sought to separate the causes of action as did the trial court. The responsibility for the scrambled pleadings rests on plaintiff's attorney. He certainly, therefore, is in no position to complaint about instruction 33, particularly when he made no specific objection thereto at the time of the trial.

The Court of Appeals also says that other instructions "requested by plaintiff or acquiesced in by her, appear to be misleading and confusing". An examination of the record shows that no instruction requested by plaintiff's attorney was refused by the District Court, although some of the tendered instructions were modified. (Tr. R. 610-14.) In the assignment of errors filed in this case by plaintiff's attorney, complaint was made of only one instruction given to the jury at the request of the defendant, namely Number 33. (R. 268-69.) The statement of the Court of Appeals is without foundation on this record.

It is well settled that instructions given by the Court to the jury and not excepted to by either party become the law of the case. *Rittgers* v. *United States* (CA, 8th Cir.), 154 Fed. 2d 768, at 772; *F. W. Woolworth Company* v. *Carriker, et al.* (CA, 8th Cir.), 107 Fed. 2d 689, at 692.

The Court of Appeals says that because of plaintiff's reliance on the charges of malice, "she failed to lay the groundwork for what we choose to call simple assault,

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negligence are set forth separately from those based on violation of the appliance acts.

"But no matter how the pleadings are allowed to stand, we think it is almost indispensable to an intelligible charge to the jury that a clear separation of the two kinds of actions be observed and impressed. The trial court in this case submitted the whole indiscriminately as a negligence case. * * * But the scrambling of the claims in this case illustrates how much evidence may be admitted, submitted and considered on negligence issues that, under our repeated holdings, would be immaterial in case of violation of the Safety Appliance Acts."

false arrest and imprisonment on which action may be maintained irrespective of harm and without proof of 'personal hostility or desire to offend.' * * * The result was that under the instructions as given, including the one objected to, the jury had no alternative but to return its verdict for defendant if it disbelieved any part of her story, although the facts otherwise established actually spelled out a cause of action on which relief could well have been predicated." (R. 284.)

Plaintiff is not entitled to another chance to try this case on a different theory.

In *Houle* v. *Helena Gas & Electric Company,* 31 Fed. 2d 671, the United States Court of Appeals for the Ninth Circuit said at 672:

> "* * * This practical construction of the complaint accepted by the parties throughout the trial, will be accepted by this court. * * *"

In *Barnsdall Refining Corporation* v. *Cushman-Wilson Oil Company,* 97 Fed. 2d 481, the United States Court of Appeals for the Eighth Circuit said at 485:

> "* * * We must, on appeal, adhere to the theory on which the case was tried in the lower court. * * *"

Plaintiff chose to bring this action on the theory of malicious acts alleged to have been committed by the defendant's agents. Her evidence was to such effect. The instructions requested by plaintiff were to the same effect. The jury by its verdict said defendant was "not guilty" of malice. The trial judge refused to upset that verdict.

Plaintiff's attorney made an election. He sought to recover on charges of malice. He failed. Why shouldn't he be held to the choice he made? In *Woodbridge, et al.* v. *Du Pont, et al.* (CA, 2nd Cir.), 133 Fed. 2d 904, the Court

considered if it could review whether there was sufficient evidence to make a jury question, when such point had been raised on plaintiffs' motion for a new trial but the plaintiffs had made no motion for a directed verdict. That Court held it could not and at page 904 said:

> "So far as appears, *they (the plaintiffs) were content to gamble upon the result, and to reserve any right they had until after they had lost.* There is no just reason to relieve them of such choice, once deliberately made." (Italics supplied.)

The manifest unfairness of the holding of the Court of Appeals should also be pointed out. In giving plaintiff another chance, that Court does not say that a new trial shall be confined to a charge of simple assault, false arrest and imprisonment under amended pleadings. The charge of malice has been adjudicated in defendant's favor. Why should defendant be compelled to stand another trial on that charge? That Court is not only giving plaintiff another trial on the charges of "simple assault, false arrest and imprisonment," but is leaving plaintiff free to relitigate the charge of malicious assault, arrest and imprisonment against defendant.

(c) No Other Exception to the Rule That an Order Overruling a Motion for New Trial Is Neither Appealable Nor Reviewable on This Record Is Applicable.

The District Court considered plaintiff's motion for new trial. It did not exclude from consideration any matter which was appropriate to a decision on said motion. It did not deny such motion for the reason that it had no authority to grant it on the ground advanced.

III.

IN GRANTING PLAINTIFF A NEW TRIAL, THE COURT OF APPEALS DID BY INDIRECTION WHAT IT COULD NOT DO DIRECTLY.

Plaintiff made no motion for a directed verdict in the District Court. As the Court of Appeals correctly held, she is not in a position to deny that there is substantial evidence to support the verdict. *Edwards, et al.* v. *Craig* (CA, 7th Cir.), 138 Fed. 2d 608; *Harnik* v. *Lilley* (CA, 8th Cir.), 167 Fed. 2d 159 at 160; Barron and Holtzoff's Federal Practice and Procedure, Rules Edition, Volume 2, page 781.

It is a well settled principle of law that one cannot do by indirection what he cannot do directly. We submit that the opinion of the Court of Appeals does just this because, while foreclosing plaintiff from attacking the sufficiency of the evidence to support the verdict and judgment in question, nevertheless it considers the evidence in reviewing the order overruling her motion for a new trial. If plaintiff can accomplish by a motion for a new trial what she could have accomplished but failed to secure by a motion for a directed verdict, there is nothing left of the rule that the sufficiency of the evidence cannot be attacked upon appeal if a motion for a directed verdict is not made.

In *Kerr, et al.* v. *Clampitt, et al.*, 95 U. S. 188 at 189, this court said:

> "* * * We have no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, however meritorious the grounds presented for its consideration or erroneous its decision. *The final judgment cannot be examined through the rulings of the lower court upon that question.* If, therefore, when the final judgment is brought before us for review by writ of error, no other documents are presented for our consideration than such as were be-

fore the inferior court upon the application for a new trial, we cannot look into them; and if error is not otherwise disclosed by the record, the judgment must be affirmed. * * *'" (Italics supplied.)

IV.

THE CASES CITED IN THE OPINION OF THE COURT OF APPEALS DO NOT SUPPORT ITS CONCLUSION.

In *Aetna Casualty & Surety Company* v. *Yeatts*, 122 Fed. 2d 350, the United States Court of Appeals for the Fourth Circuit discussed the origin of the right of a trial judge to set aside a verdict of the jury and pointed out that it was a power exercised in pursuance of a sound judicial discretion. In discussing that point, that court commented on the power of a federal *trial* judge in like circumstances and concluded he had similar power. But the power of the federal *trial* judge to set aside a verdict and grant a new trial is *different* from the power of a federal *reviewing* court in the same situation. Although the court in the *Yeatts* case thought the trial judge might properly have granted a new trial, it refused to intervene. Certainly the *Yeatts* case is not an authority for the action of the Court of Appeals in this case.

The Court of Appeals also cites *Murphy, et al.* v. *United States District Court, etc., et al.*, 145 Fed. 2d 1018. In that case the District Court allowed a new trial more than 60 days after the filing of an intention to move for a new trial notwithstanding a California statutory provision specifying that "the power of the court to pass on motions for new trial shall expire 60 days from and after * * * filing of the notice of intention to move for a new trial."

The United States Court of Appeals for the Ninth Circuit said at page 1020:

"A Federal *District* Judge not only has the power

> and authority but is charged with the duty and responsibility to set aside the verdict of a jury and to grant a new trial when in his judgment and discretion the amount of compensation awarded is excessive. The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just. * * * (citing cases). To curb this authority and responsibility by enforcing the time limit prescribed by State statute would tend to encumber and defeat the administration of justice in this case." (Italics supplied.)

We do not perceive that the *Murphy* case is any authority for the award of a new trial by the Court of Appeals in the instant case.

The Court of Appeals also cites the case of *Virginian Railway Company* v. *Armentrout* (CA, 4th Cir.), 166 Fed. 2d 400. As heretofore shown this is one of the isolated cases representing an exception to the prevailing rule. The decision was predicated on the ground the trial judge was guilty of an abuse of discretion analogous to an error of law. We have heretofore pointed out that there was no abuse of discretion by the District Court in the present action in denying plaintiff's motion for a new trial.

Finally, this court cites the case of *Kotteakos, et al.* v. *United States of America,* 328 U. S. 750. An examination of the opinion in the *Kotteakos* case shows its complete inapplicability to the present action.

In that case the only question was whether defendants suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the government admitted proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure. Defendants were convicted under the general conspiracy section of the Criminal Code of conspiring to violate the provisions of the National Housing Act. The judgments of conviction were affirmed by the

United States Court of Appeals for the Second Circuit. This court granted certiorari because of the importance of the question to the administration of criminal justice in the federal courts. This court, in an opinion by Mr. Justice Rutledge, then points out the criticisms that had been made of the administration of criminal justice in the federal courts because of the seemingly large number of reversals on technical grounds and the steps taken to remedy the situation. The pronouncement quoted by the Court of Appeals from the opinion in the *Kotteakos* case was made in the light of the background of that case.

Conclusion.

For the reasons stated and on the basis of the argument herein made, it is respectfully submitted that this petition should be granted.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

August, 1951.

SEP 6 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LeROY G. CHARLES,
JAMES G. LEMON, JR.,
180 W. Washington Street,
Randolph 6-6577,
Chicago, Illinois,
Attorneys for Respondent
Rosa Charles.

Midwest Law Printing Co., DEarborn 7-6020

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IN THE

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No.

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Petitioner,

vs.

ROSA CHARLES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent, Rosa Charles, files this brief in opposition to the granting of a writ of certiorari sought by the Norfolk & Western Railway Company to the judgment of the United States Court of Appeals for the Seventh Circuit entered herein on the 12th day of March, 1951.

PRELIMINARY STATEMENT.

The statement of the petitioner is inaccurate and incomplete. We shall supplement the statement with facts taken solely from the testimony of defense witnesses, and a few uncontradicted facts of respondent.

The head brakeman, Coombs, talked to conductor Ireson about respondent at Bluefield, West Virgina (Tr. 125). Conductor, Ireson, then went to respondent and asked her to move into the head coach. Answer, conductor: she says, "I bought my ticket, and I am not going to move", I said, "All right, I'll have you moved when I get to Roanoke" (Tr. 127). The conductor wired the superintendent, the special officer (Keister) and the station master at Roanoke about the respondent (Tr. 141). The conductor was in the coach by the respondent five times and she was a perfect lady each time he was in there (Tr. 139-140). (Police Officer F. S. Copenhauer, a defense witness). The respondent was a perfect lady at all times (Tr. 175). When the respondent was locked up in jail, she could have been carried into court and tried immediately (Tr. 182-3). Q. "So the judge was there, the clerk was there, the witnesses were there and the prisoner was there, and they didn't try her; that's right, isn't it?" A. "Yes sir". (Tr. 184).

"The police did not give respondent any food and refused her request to contact her people for her." (Tr. 184-5).

Mr. Ferguson objected to certain exhibits concerning the trial in Roanoke.

The Court: "One thing I can't understand is why, if she could only be fined Twenty-five Dollars ($25.00), why she had to have Three Hundred Dollars ($300.00) bond. That is one thing I cannot understand." Mr. White, "Well, the record shows Two Hundred Fifty-one Dollars ($251.00)" (Tr. 189). The Court: "Well, why should she have to have Two Hundred Fifty-one Dollars ($251.00) bond if the maximum for the offense could only be Twenty-five Dollars ($25.00)?"

The Court: "You can't infer anything else but that they were pushing the young woman around. That's all. They wanted to keep her in jail until Monday over the weekend."

(Head brakeman A. R. Coombs, defense witness): Mr. Coombs requested the respondent to move into the separate coach for colored passengers three times and she did not answer him. He reported the matter to the conductor (Tr. 194-95, 204-5). Mr. Coombs pointed the respondent out to special officer Keister and a military policeman and saw her fighting the two officers when they took her out on the platform (Tr. 196). Mr. Coombs weighed 165 or 170 pounds.

(Special Officer Keister, defense witness.) Officer Keister has been employed by the petitioner 15 years (Tr. 210). He was directed to the train and the coach in which respondent was riding by R. L. Sprawling, station master, (Tr. 212), and went to respondent and asked her to move into a separate coach for colored passengers. She refused and he caught her by the arm and asked a military policeman to assist him with her to the other car, and she began fighting and they took her off the train and had one of the clerks to call the police patrol (Tr. 214). She was taken to the police station and officer Keister placed charges against her in ten minutes (Tr. 216-17). Officer Keister weighed 230 pounds (Tr. 218).

There were about 50 passengers in the coach with respondent, both ladies and men. The officer did not say anything to any passenger, woman or man, except respondent. He did not pick up or attempt to pick up any lady's coat or wrap, other than respondent's. He did not ask any lady to move or catch her by the arm, other than respondent. (Tr. 219).

He went to respondent and asked her to move because she was colored. Had she been a white lady, he would not have bothered her or asked her to move. He would not have caught her by the arm or placed charges against her. The sole and only reason he placed charges against respondent was because she was a colored woman riding in a coach with white people. If she had not been riding in a coach with white people, he would not have bothered her. (Tr. 220).

Uncontroverted evidence by respondent: The respondent was imprisoned from 10:00 o'clock a.m., until 10:00 o'clock p.m. (Tr. 39). She gave the janitor Ten Dollars ($10.00) to send her a lawyer and gave the lawyer Ten Dollars ($10.00) to wire her people in Chicago for Three Hundred Dollars ($300.00) bond money. Her mother-in-law wired her Three Hundred Dollars ($300.00) from Chicago for bail. (Tr. 40).

Opinion Below.

Opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 188 Federal 2nd 691, and set out on pages 280-286 of the record, as stated in the petition.

Jurisdiction.

The jurisdiction of this court under section 1254, paragraph (1) of Title 28, United States Code, is conceded.

Reasons Why Writ Should Not Be Granted.

The court having declared the Virginia Statute upon which the petitioner based its defense and the regulations of petitioner absolutely null and void and two courts having found against petitioner on the question of agency and the trial court having found against petitioner on the questions of the statute of limitations and *res adjudicata,* and all such defenses having been abandoned by the petitioner, leaves it without any defense whatsoever in this court.

There is no important or unsettled question of federal law involved with respect to the reversal of the judgment. There is no conflict between the decision of the Court of Appeals and applicable decisions and rules of practice and procedure of this Court. Neither of these grounds exist.

A common carrier of an interstate passenger can subject such passenger only to such rules and regulations as are valid and applicable to all other members of the traveling public. Any rule or regulation which violates this fundamental principle and subjects an interstate passenger to different treatment because of an arbitrary illegal classification on the basis of color pursuant to a state statute or custom or practice in that state, is null and void and subjects the carrier to absolute liability and damages.

BRIEF.

I.

The Virginia statute relied upon in petitioner's answer as amended is unconstitutional and void, and the regulations set forth in said answer are void.

Morgan v. *Virginia,* 328 U. S. 373

Matthews v. *Southern Ry. System,* 157 Fed. 2d 609

Chance v. *Lambeth et al.,* 186 Fed. 2nd 879

Whiteside v. *Southern Bus Lines,* 177 Fed. 2d 949

Lee v. *Com.,* 189 Va. 890

Taylor v. *Com.,* 187 Va. 214, 218

II.

There is not a single question of fact presented to this Court. The Circuit Court of Appeals passed solely upon questions of law.

Shearer v. *Porter,* 155 Fed. 2d 77, 81

Atlantic Refining Co. v. *Forrester,* 25 Atl. 2d 667, 670

Cousins v. *Sovereign Camp W.O.W.,* 35 S.W. 2d 696, 699

Krepcik v. *Interstate Transit Lines,* 38 N.E. 2d 553, 537

Willard v. *Zehr,* 251 Ill. 148, 154

Washington v. *L. & N. Ry. Co.,* 136 Ill. 49, 52

III.

The liability of the petitioner for damages in the case at bar is absolute.

Matthews v. *Southern Ry. System,* 157 Fed. 2d 609

Chance v. *Lambeth, et al.,* 186 Fed. 2d 879

Whiteside v. *Southern Bus Lines,* 177 Fed. 2d 949

Chicago and Eastern Ry. Co. v. *Flexman,* 103 Ill. 546, 550-1.

Layne v. *Ry. Co.,* 66 W. Va. 607

Gillingham v. *Ohio River Ry. Co.,* 35 W. Va. 588, 592, 598

Eichengreen v. *Ry.,* 96 Tenn. 229

IV.

Where the cumulative effect of the errors prejudice the substantial rights of the losing party, the verdict and judgment thereon cannot stand.

Kotteakos v. *United States,* 328 U.S. 750

United States v. *Donnelly,* 179 Fed. 2d 227, 233

Rosa Charles v. *Norfolk and Western Ry. Co.,* 188 Fed. 2d 691

V.

Petitioner's instruction number 33 placed upon respondent an illegal burden of proof and erroneously withdrew from the consideration of the jury two proven grounds of recovery.

Weber Wagon Co. v. *Kehl,* 139 Ill. 644, 656-7

Devine v. *Delano,* 272 Ill. 166, 174

Gillingham v. *Ohio River RR Co.,* 35 W. Va. 588

Eichengreen v. *Railroad,* 96 Tenn. 229.

VI.

A valid defense cannot be sustained under an unconstitutional statute.

Norton v. *Shelby County,* 118 U.S. 427, 442

Chicago Ind. and L. Ry. Co. v. *Hackett,* 228 U.S. 559, 566

Com. v. *Malco-Memphis Theatre,* 169 S.W. 2d 596, 598

Allen v. *Holbrook,* 135 P. 2d, 242, 246

Minnesota Sugar Co. v. *Iverson,* 91 Minn. 30, 40

VII.

The petitioner having acted under a void statute, its liability to respond in substantial damages is absolute.

Sumner, et al. v. *Beeler,* 50 Ind. 341, 342

Chenango Bridge Co. v. *Paige, et al.,* 83 N.Y. 178, 190

Chapman v. *Selover,* 159 N.Y.S. 632, 636

ARGUMENT.

The petitioner has not shown that the Circuit Court of Appeals reversed the judgment upon errors of fact and has not shown that the Opinion of the Circuit Court of Appeals is upon an important federal question, which has not been settled by this court. The petitioner does not contend that the verdict of the jury and the decision of the trial court are just and correct.

I.

In the case of *Morgan* v. *Virginia,* 328 U.S. 373, this court held the Virginia statute, relied upon by the petitioner in its answer, requiring the separation of interstate white and colored passengers within the state of Virginia to be an unlawful burden upon interstate commerce and null and void.

This decision was followed in *Matthews* v. *Southern Railway System,* 157 Fed. 2d, 609; *Chance* v. *Lambeth,* 186 Fed. 2d, 879; *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d, 949; *Lee* v. *Commonwealth,* 189 Va. 890, and *Taylor* v. *Commonwealth,* 187 Va. 214.

In the case of *Chance* v. *Lambeth, et al.,* 186 Fed. 2d, 879, 881-2, the Circuit Court of Appeals held that the regulations of a carrier requiring the separation of white and colored interstate passengers were unconstitutional regulations and void. The same principles were laid down by the court in *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d. 949, and *Taylor* v. *Commonwealth,* 187 Va. 214.

Every defense pleaded by the petitioner in its answer as the same was amended has been passed upon by the Court adversely to the petitioner and has been abandoned by the petitioner. The petitioner comes before this Court in the peculiar position of not contending that it has a defense, but asserting the inherent impotency of the Court to reverse the trial court and order a new trial, where justice has not been done and serious errors of law were committed in the trial of the cause as pointed out in the opinion of the Circuit Court of Appeals.

II.

There is not a single question of fact presented to this court. The Circuit Court of Appeals passed solely upon questions of law. The petitioner has not pointed to a single controverted or contested fact involved in the opinion of the Circuit Court of Appeals. The petitioner has not cited a single case involving the applicable principles of law herein, where a Circuit Court of Appeals has held to the contrary. In the case of *Shearer* v. *Porter*, 155 Fed. 2d, 77, 81, the Court said:

> "On the present record, we must hold that there was no question for the jury on whether overcharges had been made under the Regulation, or of their amount. The evidence unequivocally established those facts as a matter of law."

In the case of *Atlantic Refining Company* v. *Forrester*, 25 Atl. 2d, 667, 670, the Court said:

> "But, in cases where the facts are agreed upon, or proved without contradiction, and there is no dispute as to any material inference of fact, the court may decide the issue as one of law. *Harrison* v. *Central Construction Co.*, 135 Md. 170, 180, 108 A. 874; *Beasman* v. *Butler*, 133 Md. 382, 387, 105 A. 409; *Schemmel* v. *T. B. Gatch & Sons, etc., Co.*, 164 Md. 671, at page 675, 166 A. 39."

In the case of *Cousins* v. *Sovereign Camp W.O.W.*, 35 S.W. 2nd 696, 699, the Supreme Court of Texas said:

> "This is no dispute in the entire record of the fact that the defendant in error is incorporated and exists under the laws of the state of Nebraska and has its principal place of business in that state. Hence, the finding of the trial court with reference to its residence must be treated as a conclusion of law, as it was doubtless intended; but, in any event, a finding of fact based upon undisputed evidence is an issue of law and is within the jurisdiction of this court. *Texas Loan Agency* v. *Fleming*, 92 Tex. 458, 49, S.W. 1039, 44 L.R.A. 279."

In the case of *Willard* v. *Zehr*, 215 Ill. 148, 154, the Supreme Court of Illinois said:

> "Whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other they are said to be at an issue, and when a material fact is thus affirmed and denied an issue of fact is formed for trial, and its determination usually results in a judgment for one party or the other."

III.

The liability of the petitioner to the respondent for damages is absolute. The evidence considered by the Circuit Court of Appeals and set forth herein is positive uncontradicted evidence. There is no conflict in the evidence requiring a determination of the credibility of witnesses or the rejection of evidence. It is a matter of applying the applicable principles of law of carrier and passenger to undisputed facts given in evidence by the defendant's own witnesses.

In the case of *Matthews* v. *Southern Railway System*, 157 Fed. 2d 609, the plaintiffs, colored interstate pas-

sengers, refused to move into the car reserved for colored passengers and the conductor pointed the plaintiffs out at Lynchburg, Virginia, to a police officer who requested the plaintiffs to move into the other car and they refused. The agents of the road and the police officer claimed to act pursuant to the Virginia statute which requires the separation of white and colored passengers in public conveyances. The plaintiffs were removed from the train. The facts were not disputed. The lower court found the defendant not guilty. The Court of Appeals reversed the decision and held that the carrier was liable and that it was required to protect its passengers against assault and interference until they had peacefully completed their journey.

In the case of *Chance* v. *Lambeth, et al.,* 186 Fed. 2d 879, the plaintiff, an interstate colored passenger, was ejected from the defendant's train and arrested because of his color. The defendant relied upon its regulations requiring the separation of white and colored passengers. The Court directed a verdict for the plaintiff upon the illegal arrest only. There was no conflict in the evidence. The jury returned a verdict of Fifty ($50.00) Dollars. The Circuit Court of Appeals reversed the case upon the ground that damages were assessed upon the wrong theory. The Circuit Court of Appeals said the liability of the defendant was absolute. The defendant petitioned this Court for Certiorari and Certiorari was denied on May 28, 1951, in 341 U.S. 941. The case of *Whiteside* v. *Southern Bus Lines,* 177 Fed. 2d 949, was a similar case and the court held that the liability of the bus lines was absolute.

In the case of *Gillingham* v. *Ohio River RR Co.,* 35 W. Va. 588, the conductor called police officers and mis-

takenly pointed out the plaintiff as the man who had assaulted and cut him with a knife. The Court held that the company was obligated to protect its passengers against any injury from negligence or wilful misconduct of its servants while performing the contract of carriage and protect them from assaults by fellow passengers and strangers so far as practicable; that the obligations continued as long as the contract of carriage was being performed; the modern doctrine is well-settled, that which the superior has put the inferior in motion to do, must be regarded as done by the superior himself and his responsibility is the same as if he had done it in person; that these principles covered acts of omission as well as commission; that where a conductor wrongfully evicts a passenger from the train, the liability of the company is unquestionable and that principle applied to such acts as assault and battery.

In the case of *Chicago & Eastern R. R. Co.* v. *Flexman,* 103 Ill. 546, 550-1, the Supreme Court of Illinois, quoting from *Goddard* v. *Grand Trunk Ry. Co.,* 57 Me. 202, said:

> "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * He must not only protect his passengers against the violence and insults of passengers, but, *a fortiori,* against the violence and insults of his own servants. If this duty to the passenger is not performed,—if this protection is not furnished,—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible."

In the case of *Layne* v. *Railway Compwany,* 66 W. Va. 607, plaintiff's intestate was shot and killed by a special

officer of a detective agency. The court held that the officer was rendering service for the company and that the company was liable for the tortious acts of its servants even though wilful and maliciously done within the scope of their employment, and further held that the act of the officer breached the contract of carriage to protect the passengers from all tortious acts of its servants, and that the breach however occasioned, made the company liable to the passenger; that liability does not depend upon whether the servant acted as the carrier's agent in inflicting the injury, but whether or not the carrier has broken its contract for safe carriage of passengers.

In the case of *Eichengreen* v. *R.R.*, 96 Tenn. 229, a special officer employed by the road in Kentucky sent a telegram to the police in Gallatin, Tennessee, to arrest the plaintiff for attempting to pass counterfeit money. The plaintiff was arrested pursuant to the telegram and recovered a judgment for One Dollar. The case was reversed on appeal. The Court held that the special officer was employed by the defendant to protect its property and to ferret out and prosecute parties committing crimes against the property of the defendant and was liable.

IV.

The judgment of the Circuit Court of Appeals is correct. That court held (1) that considering the exceptional nature of this case in which the uncontradicted evidence showed the absolute liability of petitioner; and the entire record showed that justice had not been done; (2) that instruction No. 33 was wrong in application to the proof made and the error pervaded the entire charge to the jury and the record and deprived respondent of two

proven grounds of recovery by uncontradicted evidence, and deprived the jury of freedom of judgment and compelled a verdict for petitioner, which prejudiced the substantial rights of respondent. *Kotteakos* v. *United States,* 328 U.S. 750, 762 and 768.

The petitioner has not cited a single case holding contrary to the Circuit Court of Appeals in the instant case on applicable principles of law. Every case cited by petitioner involved highly conflicting evidence in support of a legal defense interposed and urged. In this Court, no defense is claimed in the petition and not a single fact is pointed out which tends to support the verdict. The petition is general and abounds in hidden presumptions. It considered everything in the abstract and nothing in particular. There are not even abstract similarities between the cases cited by petitioner and the facts and circumstances in the instant case.

In the case of *United States* v. *Donnelly,* 179 Fed. 2d 227, 233, the court said:

> "The question before us is: What effect did the errors hereinbefore described have, or what effect may they reasonably have had, upon the jury's decision, *Kotteakos et al.* v. *United States,* 328 U.S. 750, 763, 66 S. Ct. 1239, 90 L. Ed. 1557. This was a close case, depending largely on the credibility given to the testimony of an alleged accomplice. In *Berger* v. *United States,* 295 U.S. 78, 89, 55 S. Ct. 629, 79 L. Ed. 1314, the Supreme Court characterized the case against Berger for conspiracy as 'weak', depending as it did upon the testimony of Katz, an accomplice. We feel the errors were not harmless, Rule 52, Federal Rules of Criminal Procedure; *Bollenbach* v. *United States, supra; Bihn* v. *United States,* 328 U.S. 633, 66 S. Ct. 1172, 90 L. Ed. 1485, and conclude that their cumulative effect was to

prejudice substantial rights of the defendant, to the end that the judgment of guilty herein cannot be sustained."

V.

Petitioner's instruction No. 33 placed upon respondent an illegal burden of proof and erroneously withdrew from the consideration of the jury two proven grounds of recovery. Petitioner contends that instruction No. 33 was not objected to. On page 244 of the transcript, the court held the instruction proper and the record shows a discussion on that instruction. The official reporter did not take down the specific objections. The objections were verified by the Court on motion for a new trial.

> Mr. Ferguson: "Your Honor, you remember that I objected to this instruction."
>
> The Court: "Oh, of course you did".
>
> There was discussion and Mr. Ferguson said: "No, your Honor, but, if your Honor remembers, I objected on the ground that—"
>
> Mr. Ferguson was cut off by the Court. The Court said: "Oh, well, I know you objected. I remember the whole story". (Tr. 255).

Paragraph 6 of the Amended Complaint alleged that the conductor, a detective employed by the defendant and a military policeman called by the conductor committed the acts complained of.

Paragraph 7 of the Amended Complaint alleged that the defendant then and there with great force and arms assaulted and beat the plaintiff and committed all of the other acts complained of. (Tr. 10 and 11.)

Paragraph 9 of the Amended Complaint stated that the defendant caused and procured the commission of the acts complained of.

Paragraph No. 10 alleged that the acts were committed by the defendant with malice.

This instruction placed upon the respondent an illegal burden of proof and directed the verdict against the causes of action stated in paragraphs 7 and 9 and wholly withdrew them from the consideration of the jury.

In the case of *Weber Wagon Co.* v. *Kehl,* 139 Ill. 644, 656, the Supreme Court of Illinois said:

> "The plaintiff had the right to aver in his declaration as many grounds of recovery as he saw proper, but it was not necessary to prove all that was alleged. It was sufficient to prove enough of the negligence charged to make out a case."

In the case at bar the causes of action set forth in paragraphs 7 and 9 allege that the defendant committed the acts complained of.

In the case of *Chicago Grand Trunk Ry. Co.* v. *Spurney,* 197 Ill. 471, 473, the Supreme Court of Illinois said:

> "Where a tort is averred and the substance of the allegation is proved, a variance is not material if the opposite party has not been misled."

On page 477, the Court, quoting from Chitty on pleadings, said:

> "In torts, the plaintiff may prove a part of his charge if the averment is divisible and there be enough proved to support his case."

In the case of *Devine* v. *Delano,* 272 Ill. 166, 174, the Supreme Court of Illinois said:

> "Where there are two charges of negligence in the declaration, the rule is that proof of either one of the charges is sufficient to warrant a recovery, provided the negligence is shown to be the proximate cause of the injury; (*Chicago and Grand Trunk Rail-*

way Co. v. *Spurney,* 197 Ill. 471; *Weber Wagon Co.* v. *Kehl,* 139 id. 644;) and this even though the two charges of negligence are joined or coupled together as they are in each count of this case."

VI.

A void statute and void regulations of petitioner cannot protect it from liability.

In the case of *Norton* v. *Shelby County,* 118 U.S. 427, 442, this Court said:

> "An unconstitutional act is not law; it confers no rights; It imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

We find the same principles laid down in *Chicago, Indiana & L. Ry. Co.* v. *Hackett,* 228 U.S. 559, 566; *Comm.* v. *Malco-Memphis Theater,* 169 S.W. 2d 569, 598; *Allen* v. *Holbrook,* 135 P. 2d 242, 246, and *Minn. Sugar Co.* v. *Iverson,* 91 Minn. 30, 40.

VII.

The petitioner acted at its peril in committing the acts shown by the uncontradicted evidence and its own evidence herein. It cannot avoid paying substantial damages to respondent on such evidence. In the case of *Summer, et al.* v. *Beeler,* 50 Ind. 341, 342, the Court said:

> "No question in law is better settled, and this is admitted by the counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do so at their peril, and must take the consequences."

In the case of *Chenango Bridge Company* v. *Paige, et al.* 83 N.Y. 178, 190-2, the defendant built a bridge and used it as a toll bridge pursuant to an act of the legislature which was unconstitutional. The plaintiff, another toll bridge owner, had exclusive rights to operate such a bridge, and sued the defendant for damages. The Court of Appeals of New York held the defendant liable for the full amount of the tolls collected.

In the case of *Chapman* v. *Sellover,* 159 N.Y.S. 632, the plaintiff sued for damages for false imprisonment and assault and battery committed pursuant to a void ordinance. On page 636, the Court said:

> "Under these circumstances it seems clear that the learned trial judge was in error in instructing the jury in effect that the ordinance was a protection to defendant in making the arrest, if he used no more force than was necessary. Even if plaintiff had violated some other law and was actually guilty of a crime, the arrest which defendant made for violating the ordinance could not be justified by showing plaintiff's guilt of such other crime. *Snead* v. *Bonnoil,* 166 N.Y. 325, 59 N.E. 899.
>
> We are also of opinion that the trial court was in error in ruling that the complaint stated a cause of action for assault only, and not for false imprisonment."

CONCLUSION.

No grounds appear which warrant the granting of the Writ in this case. Although, petitioner has attacked the judgment of the Circuit Court of Appeals of the Seventh Circuit, that Court did not depart from the applicable decisions of this court, and its holding finds support in the decisions of other state and federal courts cited herein. There is involved no unsettled principles of law having wide application. This Court passed upon the con-

trolling question involved herein on May 28, 1951, when it denied certiorari in *Chance* v. *Atlantic Coast Lines,* 341 U.S. 941. There is no important question in this case requiring an additional definitive expression of this Court.

Since the facts re-examined and considered by the Circuit Court of Appeals of the Seventh Circuit were uncontradicted, and facts given by defense witnesses only, a question arose as to the applicable principles of substantive law, which the Circuit Court of Appeals decided.

The Circuit Court of Appeals re-examined the facts to determine the applicable principles of law and did not reverse the case on any question of fact, but solely on questions of law.

The Circuit Court of Appeals considered the legal effect, under the applicable principles of law, of the undisputed evidence and the defendants' own evidence, which raised questions of law as clearly as the admitted fact by a plaintiff that he failed to stop, look and listen before entering upon a railroad crossing.

We respectfully contend that the petitioner discussed only principles of law applicable to cases on appeal, where legal defenses were interposed and urged and the evidence before the Circuit Court of Appeals was conflicting. Therefore, the entire argument of petitioner is inapplicable to the instant case, and certiorari should be denied.

Respectfully submitted,

LeRoy G. Charles,
James G. Lemon, Jr.
Attorneys for Respondent,
Rosa Charles
180 West Washington St.,
RAndolph 6-6577
Chicago, Illinois.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 235

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

vs.

ROSA CHARLES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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REPLY BRIEF FOR PETITIONER.

Since we deem the points made by plaintiff and respondent in her brief irrelevant and not proper for the consideration of this Court, we shall not answer plaintiff's brief *seriatim.*

I.

THE AMENDED COMPLAINT CHARGES THE DEFENDANT WITH MALICE. THE CASE WAS TRIED ON THE THEORY OF MALICE. THE JURY FOUND THE DEFENDANT NOT GUILTY OF MALICE AND PLAINTIFF'S MOTION FOR A NEW TRIAL WAS OVERRULED. UNDER SETTLED LAW NEITHER THE COURT OF APPEALS NOR THIS COURT CAN RETRY THE FACTS FOUND BY THE JURY AND GRANT PLAINTIFF ANOTHER TRIAL ON A DIFFERENT THEORY.

The amended complaint consists of one count (R. 9-12). It charges the defendant with *malice*. Despite the effort of plaintiff's attorneys to separate that complaint into several charges the combined effect of all such charges is *malice*—that whatever the defendant did was *maliciously* done. Paragraph 10 of said complaint avers: "That all of the aforesaid acts committed by said defendant were malicious and in disregard of plaintiff's rights and done for the specific purpose of injuring plaintiff; that malice is the gist of this action" (R. 12).

In *Kitson* v. *Farwell, et al.*, 132 Ill. 327, the Supreme Court of Illinois said at page 338:

> "* * * The gist of an action is defined to be, the cause for which an action will lie; the ground or foundation of a suit, and without which it would not be maintainable; the essential ground or object of a suit, without which it is not a cause of action. * * *"

The very essence of plaintiff's complaint is *malice*. It is elementary that a cause of action is limited by the allegations of the complaint and it is likewise elementary that the issues are made by the pleadings. The defendant, by its answer, *denied* the charges of *malice* (R. 13-17). The issue was therefore squarely made: *Was the defendant guilty of malice?* The case was tried on the theory of *malice*. The jury by its verdict of not guilty said that the defendant was *not guilty of malice*. The jury may well

have believed that plaintiff sought to make trouble and that whatever the defendant's employees did was done pursuant to the regulations of the defendant then in effect. The trial judge gave plaintiff every opportunity to prove her case. Although personally sympathetic to her, he did not feel that in the exercise of his duties as a judge, he was justified in granting her motion for a new trial in view of the evidence and the jury's verdict. The trial judge recognized that there was *substantial evidence in support of the defendant's position that it did not act maliciously.*

The Court of Appeals granted plaintiff a new trial because it felt that had she not relied on *malice,* she might have recovered on charges of what it denominates as simple assault, false arrest and imprisonment. *Under settled law,* plaintiff is not entitled to another trial. Her attorneys chose the theory on which they would bring suit on her behalf. She has had a trial of the facts on such theory and the jury found against her. *Under settled law she is not entitled to another trial on a different theory.* If every litigant who brought an action on a certain theory and lost were given an opportunity to try the action on some other theory, litigation would be endless. As shown in the petition for certiorari, an order overruling a motion for a new trial is neither appealable nor reviewable, except in those instances where the trial court mistakenly assumed it had no jurisdiction to consider the motion or where it excluded material pertinent to said motion, neither of which grounds exist on this record. This Court has so held many times; likewise the several courts of appeal.

The Court of Appeals was clearly in error in granting plaintiff a new trial on the stated ground that it thought the plaintiff could have recovered on another theory. In *Thomas, et al.* v. *Taylor,* 224 U. S. 73, which was an action against directors of a national bank for attesting a

false report of the condition of the bank, it was argued that if the defendants could have defended to a charge of a violation of the national bank act, instead of to an action for deceit, they would have been able to make a showing under which they would have been acquitted. This Court said at page 82:

> "Besides, judgment cannot be reversed upon the mere suggestion that, upon some other theory than that upon which the case was tried, evidence might have been introduced which might have changed the result. * * *"

So in the case at bar it necessarily follows that plaintiff is not entitled to a new trial merely for the opportunity of bringing her action on some other theory.

The ground upon which the Court of Appeals gave plaintiff a new trial was never suggested to nor passed upon by the District Court, nor was it advanced on appeal. As said by the Court of Appeals in *World Fire & Marine Insurance Company* v. *Carolina Mills Distributing Company* (CA, 8th Cir.), 169 Fed. 2d 826, at page 829:

> "* * * it is undesirable that an appellate court determine a cause upon a theory or issue which has neither been considered by a trial court nor advanced by either of the litigants. * * *"

In *Meloon* v. *Davis* (CA, 1st Cir.), 292 Fed. 82, it was argued that the evidence showed that the defendant was guilty of wanton and reckless misconduct in addition to the finding by the jury that he failed to exercise ordinary care. The Court of Appeals said at page 87:

> "* * * Whether, under the circumstances presented by the evidence, the defendant was guilty of wanton or reckless misconduct was a question of fact which the plaintiff could have had submitted to the jury, but did not. This not having been done, the verdict cannot be sustained on that theory of the law. * * *"

In *Witiak* v. *Delaware & Hudson Railroad Corporation* (CA, 3rd Cir.), 153 Fed. 2d 379, the Court of Appeals said at page 381:

> "Appellant strongly urges that wanton negligence on the part of the defendant would eliminate the question of decedent's contributory negligence. The principle so stressed is correctly stated. (Citing authorities.) The difficulty at this time is that under the present complaint the question of defendant's reckless disregard for the decedent's safety is not raised. The proposition was never suggested to or passed upon by the District Court but entirely aside from that, the whole rationale of the complaint is one of simple negligence for specified compensatory damages."

The holding of all of these cases is clearly to the effect that a party litigant is bound by the choice he has made. He cannot elect to sue upon one theory and then when he has gambled and lost seek to invoke another theory upon which to sustain recovery.

II.

PLAINTIFF CANNOT RETRY THE MERITS OF THE CONTROVERSY IN THIS COURT.

A.

She Was Not In a Position to Challenge the Sufficiency of the Evidence to Support the Verdict in the Court of Appeals and Cannot Do So In this Court.

The whole argument of plaintiff's attorneys in answer to the petition for a writ of certiorari is evasive and irrelevant. They seek to reargue and retry the merits. This they cannot do. *Plaintiff made no motion for a directed verdict.* She was, therefore, in no position in the Court of Appeals to challenge the sufficiency of the evidence to support the verdict. She cannot do so in this Court.

In *Harnik* v. *Lilley* (CA, 8th Cir.), 167 Fed. 2d 159, the Court of Appeals said at page 160:

> "This is an appellate court and we are without authority on appeal to set aside a general verdict because against the weight of the evidence. The only review that can be had as to the finding of fact by a jury is whether there is any substantial evidence to support it, this being a pure question of law. *When, however, there is no request for a directed verdict, the question as to the sufficiency of the evidence to sustain the verdict or judgment is not reviewable.* Amendment VII of the Federal Constitution provides, among other things, that, 'The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'
>
> "The only mode known to the common law to re-examine facts tried by a jury was the granting of a new trial by the court where the issue was tried. *This being a law action, we have appellate jurisdiction only, and the only way of securing a review of the facts is by interposing a motion for a directed verdict at the close of all the evidence and securing a ruling thereon. This presents a question of law.* * * *"

In *Emanuel* v. *Kansas City Title & Trust Company, et al.* (CA, 8th Cir.), 127 Fed. 2d 175, an action was brought for damages for breach of an escrow agreement. The issues were tried and submitted to a jury, which rendered a verdict for the defendant. After plaintiff's motion for a new trial was denied, he appealed from the judgment entered upon the verdict. At page 176 the Court of Appeals said:

> "It is necessary first to determine what questions are before this court. *The plaintiff challenges the sufficiency of the evidence to support the judgment for the defendant. He made no motion for a directed verdict.* * * * *But if the plaintiff intended to appeal in case the verdict went against him and to challenge the sufficiency of the evidence to support a judgment*

for the defendant, it was essential that he request the trial court to direct the jury to return a verdict in his favor and that he secure from that court a ruling upon his request. In the absence of such a request and ruling, the question of the sufficiency of the evidence to support the verdict and judgment is not subject to review by this court. * * * This court is a court of review and is without jurisdiction to retry an action such as this and to enter the judgment which it thinks should have been entered in the trial court. * * * We are therefore precluded from concerning ourselves with the question of the sufficiency of the evidence to support the judgment." (Italics supplied.)

In Barron and Holtzoff's Federal Practice and Procedure, Rules Edition, Volume 2, it is said at page 781:

"It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court. There are sound reasons for this rule. The party who makes no motion for a directed verdict must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the court for sharing that view. The appellate court, therefore, is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict. * * *"

B.

It Is Not the Practice of the Court of Appeals and This Court to Review the Facts, Weigh the Evidence and Pass On the Credibility of the Witnesses.

Even if plaintiff had made a motion for a directed verdict this court would not review the facts, weigh the conflicting evidence and pass on the credibility of the witnesses. In *Lavender, Admr., etc.* v. *Kurn, et al.*, 327 U. S. 645, this court said at page 652:

> "* * * The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. * * *"

In *Gunning* v. *Cooley,* 281 U. S. 90, this court said at page 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. * * *"

III.

THE COURT OF APPEALS GRANTED PLAINTIFF A NEW TRIAL FOR ALLEGED ERROR OF FACT. UNDER THE DECISIONS OF THIS COURT AND THOSE OF THE COURTS OF APPEAL OF THE SEVERAL CIRCUITS, NO REVIEW OF AN ORDER DENYING A MOTION FOR NEW TRIAL FOR ALLEGED ERROR OF FACT IS PERMITTED.

It is clear beyond question both from the explicit allegations of the complaint and from plaintiff's testimony that both she and her attorneys were mistakenly imbued with the idea that she had been *maliciously mistreated.* She wasn't content to bring a simple action for being wrongfully ejected from the train. She desired the punitive damages incident to malicious action on the part of defendant. That is what she alleged as her *one* and *only* cause of action. *Her testimony was to that effect, and her case was tried on that sole theory.* It is clear from the jury's verdict that the jury didn't believe that she was telling the truth, and did believe, from all the evidence, that there had been no malice in the conduct of the defendant or its servants.

Indeed, the issue in the case being what it was, and a

jury having found against the plaintiff, it would have been highly improper for the trial judge to have granted a new trial; and under settled law the Court of Appeals has no right to do so.

On this record it is clear that the verdict was not based on the Virginia Statute requiring the separation of interstate white and colored passengers within the State of Virginia because the trial judge told the jury there was no such valid law during the trial (R. 146).

Plaintiff's attorneys, who have shown their competence and resourcefulness throughout this case, argue that the opinion of the Court of Appeals is based solely on questions of law. That position is untenable. From a careful reading of the opinion of the Court of Appeals it is clear that that court wanted to give plaintiff another trial. Disagreement with the verdict of a jury is nothing more than *disagreement* over a question of fact. But under settled law the jury is the exclusive trier of questions of fact; and neither the trial judge nor a court of review has the right to set aside the verdict of the jury on the ground that it would have found the facts differently.

In *The Marine Insurance Company of Alexandria* v. *Young*, 5 Cranch 187 at page 190, this court said: "Can this court reverse for error in fact? Suppose we should be of opinion that the court below ought to have granted a new trial, is it not an error of fact? * * *" This court refused to grant a new trial in that case on the ground no appeal could be taken to this court from an order overruling a motion for new trial.

The only other matter considered by the Court of Appeals was instruction 33. As we showed in the petition for certiorari at pages 14 to 19, that instruction is not erroneous. It was responsive to the combined charges of malice contained in the single count of the amended complaint. A reading of that complaint will show that the cause of

action therein asserted is not divisible into several causes of action as claimed by plaintiff's attorneys on pages 16 and 17 of their brief. We reiterate that the question submitted to the jury was whether the defendant *maliciously* did the acts with which it was charged. Furthermore, the Court of Appeals did not hold this instruction improper in the light of the pleadings. What the Court of Appeals held was that this instruction and the pleadings imposed on plaintiff a greater burden of proof than would have been necessary had she elected to bring her case on another theory.

WHEREFORE, the defendant, the petitioner, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

EDWARD R. ADAMS,
HERBERT C. DE YOUNG,
CHARLES F. WHITE,
Attorneys for Petitioner.

September, 1951.